Supreme Court, U.S.
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No. 98-127

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**ALEX CAMPOS, et al.,**

*Petitioners,*

v.

**TICKETMASTER CORPORATION,**

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## BRIEF OF RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED

1. Was the Eighth Circuit correct in holding that the plaintiff ticket-purchasers are not direct purchasers of the ticket-distribution services provided by defendant Ticketmaster under its contracts with venue owners, and therefore are barred by the *Illinois Brick* doctrine from maintaining an action for damages under the Sherman Act?

2. Was the Eighth Circuit correct in holding that indirect purchasers may not assert a "co-conspirator" exception to the rule of *Illinois Brick* if the alleged co-conspirators are not parties to the action?

## STATEMENT IN COMPLIANCE WITH RULE 29.6

The parent company of respondent Ticketmaster Corporation is Ticketmaster Group, Inc. Ticketmaster Group, Inc. is a wholly-owned subsidiary of USA Networks, Inc. Ticketmaster Corporation's subsidiaries (other than wholly-owned subsidiaries) are MC France SA, Ticketmaster-Argentina SA, Venta de Boletas Por Compudoras, Ticketmaster-Australasia, Ticketmaster-Australasia (#2), Ticketmaster Bass Victoria Pty Ltd., Ticketmaster Bass Australasian Pty Ltd., The Movie Ticket Co., and Ticketmaster Golf.

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## STATEMENT OF THE CASE

Respondent Ticketmaster contracts with venues and promoters to provide computerized ticket services for concerts, sports, family shows, Broadway shows, and other live entertainment events. Typically the contracts are exclusive contracts for a term of years. The services provided under the contracts include keeping a computerized inventory of available seats, providing information about current and upcoming events, providing telephone facilities for taking orders, receiving orders, making a computer-assisted selection of seats to fill the orders, mailing tickets to the purchasers, and collecting the price of the tickets through credit-card authorizations. Ticketmaster also contracts with independent third parties to maintain ticket outlets at department stores and other easily accessible locations.

Ticketmaster does not buy and resell tickets; it acts only as agent of the venue in executing the sales of tickets. The price of the tickets sold through Ticketmaster includes a separately-stated service charge for processing the order and delivery of the ticket. The amount of the service charge is prescribed in the contract between Ticketmaster and the venue. The price of the ticket before adding the service charge is determined by the venue and/or the performer. Ticketmaster remits to the venue the price of the ticket and a portion of the service charge, as prescribed in the contract between Ticketmaster and the venue, and retains the rest of the service charge as its compensation.

Petitioners are individuals who purchased tickets for concerts through Ticketmaster. Their complaint charged Ticketmaster with violating the antitrust laws by mo-

nopolizing the business of providing ticket services for "large-scale popular music concerts" and sought recovery for alleged overcharges for ticket-delivery services resulting from the alleged monopolization.

The district court dismissed the complaint on the ground that the plaintiffs lacked antitrust standing. The court of appeals affirmed the district court's judgment as it related to damages. It held that plaintiffs were not direct purchasers of the services provided by Ticketmaster and were therefore barred by the *Illinois Brick* rule from maintaining an action to recover the alleged overcharges. The court also ruled that the allegations of the complaint did not bring plaintiffs within any exception to the *Illinois Brick* rule, and that even if the complaint had properly alleged a conspiracy between the venues and Ticketmaster, no "co-conspirator exception" to the *Illinois Brick* rule could apply since the venues were not parties to the action.

The court of appeals reversed the district court judgment as it related to equitable relief, holding that the *Illinois Brick* doctrine does not prevent indirect purchasers from suing for equitable relief.

## REASONS FOR DENYING THE WRIT

### I.

### THE COURT OF APPEALS CORRECTLY APPLIED THE INDIRECT PURCHASER PRINCIPLE.

The decision of the Eighth Circuit is a correct application of this Court's decisions in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); and *Kansas v. Utiliticorp United, Inc.*, 497 U.S. 199 (1990). The decision does not formulate any "new rule," as petitioners contend, and is not in conflict with any other lower-court decision applying the *Illinois Brick* rule.

The court of appeals correctly treated as the essence of the "indirect purchaser" concept the fact that the purchaser has borne some portion of a monopoly overcharge imposed on another by an antecedent transaction between the alleged monopolist and the other. Such a purchaser is not permitted to sue for such an alleged overcharge, because of the impossibility of determining the incidence of the overcharge as between the indirect purchaser and the immediate purchaser, and because of the potential for duplicative recovery if both the indirect purchaser and the immediate purchaser were allowed to sue. Only the immediate purchaser may sue the alleged monopolist and that purchaser may recover the entire overcharge, whether or not any or all of the overcharge was passed on to the indirect purchaser.

The principle applies here, the court of appeals held, because the complaint makes clear that any monopoly power Ticketmaster may have is exerted against the venues, through the contracts Ticketmaster enters into

with venues and promoters to provide ticket-distribution services. Ticket services are an "input" for the venues, and the plaintiffs' complaint is that the venues "are unable to obtain a necessary input . . . in a competitive market." *Campos v. Ticketmaster Corp.*, 140 F.3d 1166, 1171 (8th Cir. 1998). The fact that plaintiffs are unable to obtain competitive ticket services, if true, "is simply the consequence of the antecedent inability of concert venues to do so." *Id.* Thus the ticket purchasers are in no different position than a buyer of bread the price of which reflects the cost of the baker's oven, or a homeowner who pays a house painter a price that reflects the cost of the paint used by the painter.

Petitioners erroneously suggest that the decision announces a "new rule of liability" under which a monopolist is immune from antitrust liability if it has engaged in "any type of antecedent transaction." Pet. i, 10, 12, 13 n.9.

Such a "rule" would be meaningless—every firm engages in a multitude of "antecedent transactions"—and is not to be found in the court of appeals' opinion. The court did not refer to "any type" of antecedent transaction but to a particular type, i.e., a transaction with a prior purchaser that is the source of the alleged monopoly overcharge. The court's statement was: "An indirect purchaser is one who *bears some portion of a monopoly overcharge only by virtue of* an antecedent transaction between the monopolist and another, independent purchaser." 140 F.3d at 1169 (emphasis added). In other words, if the prices paid by petitioners contain any overcharge due to Ticketmaster's market power, it can only be because the price reflects supra-

competitive charges exacted by Ticketmaster in its contracts with the venues. Thus petitioners are necessarily complaining that they are bearing some part of a monopoly overcharge that occurs "only by virtue of" the antecedent transaction with the venue. As the court of appeals correctly discerned, any such situation presents the problem addressed by the *Illinois Brick* rule, since the complaining purchaser is injured, if at all, only by the passing on of the overcharge involved in the first transaction.

Petitioners' only basis for claiming they are "direct" purchasers is that they pay Ticketmaster for the tickets and the service charges are separately stated. However, they do not buy the tickets "from" Ticketmaster; Ticketmaster merely acts as the venue's agent, and the tickets belong to the venue until sold. Nor do the purchasers buy services as such; the service is inseparable from the purchase of the ticket, and is provided because the venue has contracted with Ticketmaster to provide it. As the court of appeals noted, the mere itemization of a separate charge for a component of a product or service does not make a consumer a direct purchaser of the component. *Id.*

Petitioners argue (and the dissenting judge in the court of appeals agreed) that none of the burden of the alleged monopoly falls on the venues because the venues receive a portion of the service charge (and therefore benefit from any monopoly exerted by Ticketmaster). The argument mistakes form for substance. Division of the service charges is the agreed method of compensation of Ticketmaster by the venue. If Ticketmaster is exacting supracompetitive charges for its services, the

venue is giving Ticketmaster a larger split of the agreed service charge than it would have to give in a competitive market. As pointed out by the majority opinion below, the combined ticket price is obviously a price the market will bear, and therefore a venue free from Ticketmaster's alleged monopoly would not have to "cede" to Ticketmaster the same proportion of the service charge as it presently does. *Id.* at 1172.

It is clear, therefore, that if Ticketmaster had any monopoly power, the venues and promoters with whom it contracts would have standing to maintain actions under the Sherman Act to recover from Ticketmaster any monopoly overcharges for its services. That being so, the rule of *Illinois Brick* precludes plaintiffs from maintaining any such action, since the plaintiffs would be required to prove what part, if any, of the alleged overcharge had been passed on in the price of the tickets.

The reasoning of the opinion of the court of appeals was plainly correct and the decision represents a proper application of this Court's decisions in *Hanover Shoe*, *Illinois Brick*, and *Utiliticorp United*. The decision is not in conflict with any other court of appeals' decision, and there is no occasion for review by this Court.

## II.

## THE COURT OF APPEALS CORRECTLY RULED THAT NO "CO-CONSPIRATOR" EXCEPTION TO *ILLINOIS BRICK* WAS APPLICABLE.

Lower courts have assumed that the *Illinois Brick* rule does not apply if the direct purchaser and its supplier have conspired to violate the antitrust laws. *See, e.g., In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1163 (5th Cir. 1979); *In re Brand Name Prescription Drugs*, 123 F.3d 599, 604 (7th Cir. 1997). However, such a theory poses the risk that the accused supplier may be held liable both to the direct purchaser and the indirect purchaser—the very risk that the *Illinois Brick* rule is intended to avoid—unless the direct purchaser is bound by the judgment finding conspiracy. Therefore the courts that have addressed this issue have ruled that such a co-conspirator theory for avoiding the *Illinois Brick* rule may not be asserted unless the alleged co-conspirators are parties to the action. *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 931 (3rd Cir. 1986); *In re Beef Industry Antitrust Litigation*, 600 F.2d at 1163; *In re Midwest Milk Monopolization Litigation*, 730 F.2d 528, 529-30 (8th Cir. 1984); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335, 1342 (9th Cir. 1982); *see also In re Brand Name Prescription Drugs*, 123 F.3d at 605.

In this case the court of appeals rejected petitioners' attempt to assert a co-conspirator exception to *Illinois Brick* on two grounds. First, it held that the complaint contained "no proper allegation that the direct purchasers have conspired with or otherwise been party with Ticketmaster to any antitrust violation." *Campos v.*

*Ticketmaster Corp.*, 140 F.3d at 1171. Second, the court cited its prior holding in the *Midwest Milk Monopolization* case, *supra*, as establishing that a plaintiff cannot avoid the *Illinois Brick* rule by characterizing the direct purchaser as a party to the antitrust violation unless the direct purchaser is joined as a defendant. 140 F.3d at 1171 n.4.

The first of these two grounds is not challenged by petitioners. The court of appeals' interpretation of the complaint must therefore be accepted as correct. This means that there is no need for this Court to address the question petitioners seek to raise concerning the requirement that alleged co-conspirators be joined in the action. (Question 3 of Petitioners' Questions Presented).

In any event the court of appeals' second ground presents no issue calling for review by this Court. Although petitioners weakly urge that there is a conflict among the circuits on the point, examination of the cases they cite shows that there is no conflict. Petitioners assert that the Seventh and Ninth Circuits have adopted positions contrary to the Third, Fifth and Eighth Circuits. The cases suggest the opposite. The most recent Seventh Circuit case, *Brand Name Prescription Drugs*, *supra*, refers expressly to the requirement of joinder reflected in the Fifth Circuit's *Beef Industry* decision and notes that "that requirement is satisfied" in the case before the court. 123 F.3d at 605. The only Ninth Circuit case that directly addresses the issue also adopts the Fifth Circuit's position. *In re Petroleum Products Litigation*, *supra*. The later Ninth Circuit decision cited by petitioners, *State of Arizona v. Shamrock Foods Co.*, 729 F.2d 1208 (9th Cir. 1984), treats the complaint as alleg-

ing a separate, horizontal retail conspiracy and therefore as not implicating any passing-on theory of recovery. There is no apparent inconsistency with the Ninth Circuit's *Petroleum Products* opinion and that opinion is not mentioned in the *Shamrock* opinion.[1]

There is no split among the circuits or a "gaping loophole in antitrust law enforcement" as suggested by petitioners. The court of appeals' decision that the "co-conspirator" exception to *Illinois Brick* is not applicable to this case is consistent with the opinions in each of the four other circuits that have addressed the question and presents no issue for this Court to review.

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[1] Petitioners cite *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980), and *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), as showing the existence of a conflict. Pet. at 21 n.17. Neither case supports that claim. In *Fontana Aviation*, although the Seventh Circuit recognized that there might be a co-conspirator exception to *Illinois Brick*, the court found that this case did not "fit within the Illinois Brick mold" because "Fontana does not seek damages for an illegal indirect overcharge passed on to it as is prohibited by *Illinois Brick*. . . ." 617 F.2d at 481. There was no discussion of the question whether alleged co-conspirators must be joined. Petitioners' reliance on *William Inglis & Sons* is even more puzzling. The case involved no purchases or sales, direct or indirect, between the plaintiff and the defendants. Rather, it involved an alleged conspiracy by competitor baking companies to monopolize a market for bread products.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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